U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-A-O-N-A-

DATE: JAN. 10, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a non-profit community center, seeks to employ the Beneficiary as a pastoral assistant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. employer to sponsor a foreign national with at least two years of training or experience as a lawful permanent resident.

After initially granting the petition, the Director of the Texas Service Center revoked its approval. The Director concluded that the record as of the petition's approval did not establish the Petitioner's ability to pay the proffered wage, or the Beneficiary's possession of the minimum experience required for the offered position.

We affirmed the Director's decision on appeal and denied the Petitioner's first motion to reopen and reconsider. After rejecting the Petitioner's following "appeal" for lack of jurisdiction, we also denied its second motion to reopen and reconsider.

The matter is now before us on a third motion to reopen and reconsider. The Petitioner asserts that we erred in denying its prior motions.

Upon review, we will grant the motion to reopen in part, and deny it in part. We will deny the motion to reconsider.

I. LAW AND ANALYSIS

A. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. Here, the Petitioner has not submitted pertinent precedent decisions, regulatory or statutory provisions, or

statement of policy to demonstrate that the prior decisions were incorrect based on the evidence in the record. As such the motion to reconsider will be denied.

B. Motion to Reopen

A motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

As discussed below, during the pendency of this motion, the Petitioner submitted new evidence to establish its ability to pay the Beneficiary the proffered wage. We will therefore grant the motion to reopen, in part, to withdraw our prior finding to the contrary. However, the record does not establish that the Beneficiary has the required experience to establish eligibility, so the motion to reopen will also be denied in part.

1. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, a labor certification, approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is July 19, 2002. This is the date an office within the DOL's employment service system accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As a non-profit organization, the Petitioner does not generate income. But the record contains copies of its IRS Forms 990, Returns of Organization Exempt from Income Tax, stating its annual revenues and expenses. From the petition's priority date of July 19, 2002, until its approval date of August 16, 2006, the Petitioner's tax returns reflect sufficient surpluses to pay the annual proffered wage in all of its fiscal years, except one: July 1, 2003, through June 30, 2004. But the Petitioner's 2003-04 tax return, reflects the Petitioner's ability to pay the proffered wage based on its net current assets. The balance sheet in Part IV of the IRS Form 990 states the Petitioner's possession of $50,642 in cash at the end of that fiscal year. The balance sheet does not reflect any current liabilities for that period. Because the amount of net current assets exceeded the annual proffered wage of $21,840, the tax return demonstrates the Petitioner's ability to pay the proffered wage in 2003-04.

However, our review of the Petitioner's tax returns revealed discrepancies. A 2007-08 return that the Petitioner submitted in support of another petition reflected different revenue and surplus amounts than the tax return for the same fiscal year submitted with this petition. The dates of the returns also differed. The discrepancies cast doubt on the accuracy of the financial information in

the Petitioner's tax returns. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

In response to our first notice of intent to deny (NOID), however, the Petitioner established the reliability of the information on its tax returns of record. The Internal Revenue Service (IRS) does not maintain tax transcripts of nonprofit returns. But the Petitioner submitted copies of its returns from 2006-07 through 2014-15 from [redacted] a privately funded database of non-profit tax returns. The Petitioner's [redacted] returns contain copies of IRS receipt stamps and match the corresponding returns submitted by the Petitioner in this matter. The record therefore establishes the reliability of the Petitioner's tax returns in this matter and its ability to pay the proffered wage.

For the foregoing reasons, the record establishes the Petitioner's continuing ability to pay the proffered wage from the petition's priority date until its approval date. We will therefore grant that portion of the Petitioner's motion to reopen and withdraw our contrary finding.

2. The Beneficiary's Possession of the Required Experience

Although the record demonstrates the Petitioner's ability to pay, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification.

A beneficiary of a skilled worker petition must possess at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act; 8 C.F.R. § 204.5(l)(3)(ii)(B). A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. *See, e.g.*, *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Here, the labor certification states the minimum requirements of the offered position of pastoral assistant as two years of experience in the job offered. The Beneficiary attested on the labor certification to her possession of more than three years of full-time experience in the job offered. She stated her employment as a pastoral assistant by [redacted] in India from July 1996 to September 1999.

We found that the Petitioner's first motion to reopen established the Beneficiary's possession of her claimed qualifying experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed qualifying experience with a letter from an employer). However, our second NOID, issued during the pendency of this motion, notified the Petitioner of derogatory evidence casting doubt on the Beneficiary's claimed qualifying experience.

As stated in our second NOID, a USCIS officer visited [redacted] in India on September 2, 2016, meeting with the organization's head and two of its employees. The organization's head signed a written statement indicating that it did not employ anyone with the names of the Beneficiary

or the signatory of an initial letter in support of her qualifying experience. The organization's head also stated that it did not issue the letters in support of the Beneficiary's experience and that the letters' stationery did not belong to it. In addition, when shown a photograph of the Beneficiary and her spouse, the organization's head stated that he did not recognize them.

The Petitioner requested an extension of time in which to respond to the NOID. The regulations, however, bar us from granting an extension. *See* 8 C.F.R. § 103.2(b)(8)(iv) (limiting the response time to a NOID to 30 days). Thus, we cannot consider the Petitioner's response to our second NOID, which the Petitioner submitted after the 30-day deadline.

Moreover, even if we could consider the Petitioner's untimely response, it does not establish the Beneficiary's claimed qualifying experience. The response does not explain the discrepancies between the Beneficiary's claimed experience at and the statement of the organization's head, denying knowledge of her employment. *See Matter of Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Contrary to a statement in our second NOID, counsel asserts that current head did not lead the organization at its founding. However, counsel's assertion is not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that counsel's unsupported assertions do not establish facts of record).

The Petitioner's untimely NOID response includes additional documentary evidence in support of the Beneficiary's claimed qualifying experience. However, the documents lack details sufficient to corroborate her claimed employment in the offered position by from July 1996 to September 1999. A February 16, 2000, letter from states that the Beneficiary studied at the school for seven years and taught a class "for a short period." An affidavit from a man who purportedly trained the Beneficiary states that she worked at "as an assistant for [a] few years." Similarly, an affidavit from a woman now living in Canada states that she and the Beneficiary "learned various Islamic subjects and gave our services to for [a] few years." The documents do not provide dates of the Beneficiary's purported employment or establish her claimed experience in the offered position of pastoral assistant.

The Petitioner also submitted copies of letters from officials of a Muslim congregation in New York, including a 2013 letter stating that the Beneficiary taught at the congregation's school for at least 10 years. The Petitioner asserts: "Undoubtedly, [the] Beneficiary has the qualifications to be offered the job specified in the Labor Certification." However, the 2013 letter does not establish the Beneficiary's possession of at least two years of experience by the petition's priority date of July 19, 2002. Also, the letter does not demonstrate her possession of experience in the offered position of pastoral assistant as the labor certification specifies. The letter states the Beneficiary's experience as a "teacher" and describes her duties as teaching and helping in other school operations. The letter does not establish the Beneficiary's performance of the job duties of the offered position, which include assisting clergy in conducting Muslim worship services, and selecting books and reference materials for religious classes.

Further, if the Beneficiary gained qualifying experience with the New York congregation, the record does not explain why she did not state the experience on the labor certification or in the petition. The omission casts doubt on the purported qualifying experience. *See Matter of Leung*, 16 I&N Dec. 12, 14 (Distr. Dir. 1976), *disapp'd of on other grounds*, *Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (finding a foreign national's claim of qualifying experience to be "not credible" where the former employer was not listed on the labor certification or the petition).

For the foregoing reasons, the record as of the petition's approval did not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification. We will therefore deny the Petitioner's motion to reopen in part.

II. CONCLUSION

The Petitioner's motion to reopen establishes its ability to pay the proffered wage to the Beneficiary from the priority date onward. However, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification. We will therefore grant the motion to reopen in part, and deny, in part. The motion to reconsider was not supported by pertinent precedent or adopted decisions, statutory or regulatory provision, or statement of policy, and is therefore denied.

ORDER: The motion to reopen is granted in part, and denied in part.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-A-O-N-A-*, ID# 86410 (AAO Jan. 10, 2018)